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Concord

Opinion

April 16, 1976

Mr. James W. Nelson
Bank Commissioner
97 North Main Street
Concord, New Hampshire 03301

Dear Commissioner Nelson:

This is to advise you of the opinion of this office with respect to the permissibility under New Hampshire law of the so-called "information office" currently being operated in New London by the Sugar River Savings Bank, a state mutual savings bank established in Newport pursuant to 1895 Laws 232, with an existing branch office in Warner authorized May 4, 1972 by the Board of Trust Company Incorporation pursuant to RSA 384-B.

The office at issue is located in a New London shopping plaza, in a leased store-front occupying a portion of a building containing a number of retail shops. The sign in front of the office above the front door and picture window, reads as follows: "Sugar River Savings Bank SRS Information Office". Inside, the office consists of a large room containing a receptionist's desk and living room furniture, and a smaller, partitioned-off area in the rear which can be used as a conference room. The office is operated during business hours by an employee or officer of the bank, and is open to the public.

Activities at the information office apparently do not include the payment or receipt of deposits or the payment of checks. However, documents such as loan application forms and account signature cards for new accounts may be passed out, filled out and left for transmittal to the home office, questions concerning the bank's services may be answered in person, by telephone, and by advertising materials, and arrangements

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may be made for additional customer discussions with other bank officers and employees, which may occur by use of the New London office telephone to call the home office, or by later appointment at the New London office, home office or customer's home.

This "information office" was opened following receipt of certain letters dated April 24, 1975 and May 5, 1975 from, respectively, the New Hampshire Bank Commissioner and the Assistant Regional Director of the Federal Deposit Insurance Corporation (FDIC). The April 24 letter stated that the New Hampshire banking statutes would not prevent the opening of an office "in which questions could be answered relative to your services, advertising material passed out, loan applications passed out, etc. Banks in New Hampshire, in several instances, have placed racks containing advertising material in certain factories or other places of business". The May 5 letter stated that FDIC regulations would not be violated by the establishment of "an office for distribution of information and marketing material only.... Since the office you are contemplating will not accept deposits, pay checks or lend money, it would not be considered a branch, therefore approval is not required".

The controlling statute with respect to the legality of the New London "information office" is RSA 384-B. RSA 384-B:1, III provides:

"Branch office" means any house, office, separate building, depot, agency, mobile facility or place of business, other than its principal office, at which deposits are received, checks paid, or loans made or payments thereon received, or any of a bank's other usual banking business is conducted, but shall not include any place at which only records are made, posted or kept.

It is significant that this statute does not limit its scope to those "full" service offices which may have a separate work force and vault, and are otherwise equipped to compete successfully in their localities with independent institutions. Rather, the New Hampshire definition sets out in the disjunctive those threshold activities which result in an obligation to obtain approval from the Board of Trust Company Incorporation pursuant to RSA 384-B:2, which provides in part:

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No bank or officer, director, agent or employee thereof shall transact any part of its usual business of banking at any branch office except ... [w]ith the approval of the board....

The key phrase appearing in both RSA 384-B:1, III and 2, but not contained in the federal definition, is: any of a bank's usual business of banking.

In applying this statutory language to the fact of the present instance, the question is whether an office, identified by sign as belonging to a bank, in fact staffed by bank personnel, and established so that customers may routinely fill out and leave for transmittal to the home office loan applications and account signature cards, obtain financial advice from bank officers, or receive information relative to operations of the bank to be provided elsewhere, constitutes an office "at which ... any of a bank's ... usual banking business is conducted". The answer must be "yes", for the reasons set out herein.

First, it should be noted that neither the New Hampshire Bank Commission letter of April 24, 1975 nor the FDIC letter of May 5, 1975 went further than considering the "passing out" or "distribution" of materials, and, the provision of information and of the answering of questions as to services provided by the bank. No approval was given to the provision of financial counseling, the routine acceptance of completed signature cards of loan applications, or the use of bank personnel or a bank sign at the office. And, no approval in any form was granted by the Board of Trust Company Incorporation.

Further, as the United States Supreme Court explained in First National Bank in Plant City v. Dickinson, 396, U.S. 122, 90 S. Ct. 337, 24 L. Ed. 2d 312 (1969), activities essential to receiving, paying and lending money are unquestionably engaged in earlier than the moment in time when particular customer-bank contracts take effect or are performed. See also: Opinion S-512 of the Attorney General of Illinois (September 14, 1972). The profitable competitive advantage naturally accruing from these activities is precisely what the Legislature chose to restrict and regulate in its limitations upon branching set out in RSA 384-B:2, I (absolute geographical limitations) and RSA 384-B:2, IV(e) (calling upon the Board of Trust Company Incorporation to judge the effect of a proposed branch upon "the preservation of competition in the field of banking"). See also: 1975 HB 698 (bill, not adopted, to establish statewide branching). The policy decision that such limitations upon the availability of

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banking services are advisable in the interests of a stable banking structure has been made by the Legislature, Valley Bank v. State, 115 N.H. 151, 154 (1975), and is not open to revision except through the legislative process, as was done with regard to electronic banking with the passage of RSA 384-B:7 (Supp. 1975).

Banks perform on a routine basis at their approved facilities all of the functions performed at the New London office by the Sugar River Savings Bank. It would require a particularly strained interpretation of RSA 384-B:1, III, 2 to say that these activities are not any part of a bank's usual banking business. "Usual business" is that which is not unusual, occasional. It does not mean only the sine qua non of banking. As the Court stated by way of dictum in Franklin Nat'l. Bank v. New York, 347 U.S. 373, 377, 74 S. Ct. 550, 98 L. Ed. 767 (1954):

Modern competition for business finds advertising one of the most usual and useful weapons. We cannot believe that the incidental powers granted to national banks should be construed so narrowly as to preclude the use of advertising in any branch of their authorized business. [Emphasis added.]

And the Court in Arnold Tours, Inc. v. Camp, 472 F. 2d 427, 433 (1st Cir. CA 1972) held:

... [w]hile national banks provide certain agency and information services, they are normally of a kind which are germane to the financial operations of the bank in the exercise of its express powers. [Emphasis added.]

See also: Bank v. Haskill, 51 N.H. 116, 122 (1871) (bank cashier has duty to provide certain information). These three cases underscore the point that information services and advertising are "usual" and "normal" business activities of banks, just as are financial counseling and the routine solicitation and receipt of signature cards and loan applications.

Insofar as the branch banking statute is concerned, the question is: what activities to attract and carry on business are any part of the usual banking activities of banks? RSA 384-B:2 provides in pertinent part that:

No bank or officer, director, agent or employee thereof shall transact any part of its [meaning the bank's not the agent's] usual business of banking at any branch [including under RSA 384-B:1, III any office, agency or place of business ... at which any of a bank's usual banking business is conducted] except ... [with the approval of the board.... [Emphasis added.]

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[T]he federal statute has incorporated by reference the limitations which state law places on branch banking activities by state banks. Congress has deliberately settled upon a policy intended to foster "competitive equality"

We reject the contention ... that state law definitions of what constitutes "branch banking" must control the content of the federal definition of §36(f). ... [T]he threshold question is to be determined as a matter of federal law, having in mind the congressional intent that so far as branch banking is concerned "the two ideas shall compete on equal terms and only where the states [allow] their own institutions [to] have branches". In short, the definition of "branch" in §36(f) must not be given a restrictive meaning which would frustrate the congressional intent....⁸

[n.8] Representative McFadden described the definitional section of the Act as providing that:

Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting any business carried on at the main office, is a branch.
68 Cong. Rec. 5816 (1927).

....

Because the purpose of the statute is to maintain competitive equality, it is relevant in construing "branch" to consider, not merely the contractual rights and liabilities created by the transaction, but all those aspects of the transaction that might give the bank an advantage in its competition for customers. Unquestionably, a competitive advantage accrues to a bank that provides the service of receiving money for deposit at a place away from its main office; the convenience to the customer is unrelated to whether the relationship of debtor and creditor is established at the moment of receipt or somewhat later....

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Here we are confronted with a systematic attempt to secure for national banks branching privileges which Florida denies to competing state banks.... [T]he congressional policy of competitive equality with its deference to state standards [is not] open to modification by the Comptroller of the Currency. [Emphasis added.]

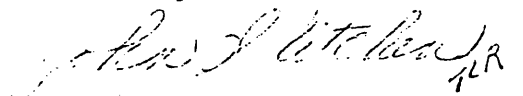
Given the differing results worked by the various federal administrative and judicial interpretations, it is well to remember that none of them control the interpretation of state law applicable to a state bank such as the Sugar River Savings Bank. As the Court held in Opinion of the Justices, 102 N.H. 106 (1959):

The business of banking bears such a relation to the economic security of the public that it is a proper subject of regulation by the State in the exercise of its police power.... The wisdom or desirability of such regulation is the concern of the legislature.... The proposed bill would not be invalid unless it were found to interfere with the purposes of national banks or to destroy their efficiency or to be in direct conflict with some paramount federal law.

See also: N.H. Bankers Ass'n. v. Nelson, 336 Fed. Supp. 1330, 1336, 1339 (1972) aff'd 460 F. 2d 30 F., cert. den. 93 S. Ct. 320, 409 U.S. 1001, 34 L. Ed. 2d 262; "American Banker" October 22, 1968. 12 U.S.C. 36 is restricted by its language to branching on the part of "national banking associations". The FDIC required branch approval provided for in 12 U.S.C. 1828(d) can do no more than impose additional requirements upon those state-chartered banks which choose to participate in these programs while continuing to be subject to the state branch banking laws set out in RSA 384-B.

Yours sincerely,


David H. Souter
Attorney General


John S. Kitchen
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